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IN THE

Supreme Court of the United States

October Term, 1960

No. 397

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS KAUFMAN, *ET AL.*, IN OPPOSITION

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October Term, 1960

No. 397

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., PETITIONERS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS KAUFMAN, *ET AL.*, IN OPPOSITION

Respondents Eric G. Kaufman, *et al.*, intervenors below, respectfully request that the petition for a writ of certiorari be denied.

Question Presented

Whether the Court below erred in holding that the District Court did not abuse its discretion in refusing to modify, after eight years of proceedings, an order of reference to a Special Master so as to delete therefrom authority to

determine issues of fact and law, where the petitioners espoused, consented to, and defended the order of reference, where the Master has been hearing and deciding substantial issues of fact and of law and has acquired a unique familiarity with the case, and where there has been no change in circumstances during the intervening eight years.

Statement

The original order of reference, drafted by petitioners and actively espoused by them, was entered on February 14, 1950 (Pet. 4). Shortly after the chief attorney in charge of the case for the petitioners was changed, petitioners moved in October 1958 to terminate or to modify the aforesaid order of reference. The petitioners first urged before the District Court that the order of reference be terminated in its entirety as invalid. They later abandoned the motion to terminate the reference and asked only that it be modified, in the exercise of the District Court's discretion, so as to limit the scope of reference to the conduct and supervision of discovery proceedings (Pet. 29-30).

Respondent Societe Internationale Pour Participations Industrielles et Commerciales, S.A., etc. (hereinafter called "Chemie"), instituted suit in October 1948 under Section 9(a) of the Trading with the Enemy Act, as amended (40 Stat. 419 as amended, 50 U.S.C. App. 9(a)), to recover property seized by the Alien Property Custodian consisting of approximately 93 per cent of the stock in General Aniline & Film Corporation, New York, valued at more than $100,000,000 and cash of approximately $2,000,000 (J.A. 17-33). Petitioners' answer put in issue the asserted non-enemy status of the respondent corporation (See *Societe Inter-*

nationale, etc. v. *Rogers*, 357 U. S. 197). Respondents Kaufman and others represent some 1,700 stockholders of I. G. Chemie who have intervened, pursuant to this Court's decision in *Kaufman* v. *Societe Internationale, etc.*, 343 U. S. 156, and assert on behalf of all non-enemy stockholders a derivative claim for corporate recovery of that part of the vested assets which is proportionate to the non-enemy stock interest in Chemie.

In 1950, the petitioners, acting upon the suggestion of the late Chief Judge Laws, actively espoused, prepared, and secured a general reference (J.A. 74-76)[1] of the case to a Special Master (J.A. 67, 70, 72-74, 162-3). In 1951 they defended the reference against efforts to vacate it (J.A. 84-5).

Following the intervention of Kaufman pursuant to the mandate of this Court, petitioners thereafter initiated and conducted motions and proceedings relating to the intervenors (*e.g.* J.A. 102). The intervenors, all of whom adopted the reference, did likewise (*e.g.* J.A. 87). It may fairly be said, that as to all matters affecting the claim in intervention, all of the parties thereto joined in, adopted, consented to and acted under the order of reference as signed by Judge Laws. Many matters of substance were presented to the Special Master from time to time, both by the petitioners and the various respondents. In now seeking to modify the order of reference the petitioners made no showing of any change in circumstances other than a

[1] The order of reference provided in part, "that William J. Hughes, Jr., Esquire, a member of the bar of this Court, is hereby appointed Special Master and there is referred to him as such the determination and findings of all issues of fact and law involved in said action excepting only those in the proceedings in intervention now on trial in this Court" (J.A. 75).

change in government counsel. The District Court, in exercising its discretion, denied the motion for modification (Pet. 30). The Court of Appeals affirmed (Pet. 14-24).

Reasons for Denying the Writ

There are no considerations involved in this case justifying review by this Court.

The decision of the Court of Appeals is not in conflict with that of any other court of appeals. The Court of Appeals has not decided an important question of federal law nor is its decision in conflict with applicable decisions of this Court. Further, the decision of the Court of Appeals does not involve any departure from the accepted and usual course of judicial proceedings.

The considerations involved in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 are not present here.[2] In *La Buy*, an order of general reference was issued *sua sponte* over the objections of all the parties. Thereafter prompt action was taken to challenge and vacate the order. Here, the petitioners not only consented to but actively espoused and sought the order of reference. Thereafter, all of the parties accepted the reference and operated under it. A general reference to a Master on consent is valid and binding, whatever the rule may be in the absence of consent. *Kimberly* v. *Arms*, 129 U. S. 512. *See* Kaufman, *Masters*

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[2] A major consideration which led this Court to review the *La Buy* case was the question when courts of appeals could issue interlocutory writs of mandamus to correct abusive references under F.R.C.P. 53. See 352 U.S. 249, 250, 260. That question is not present in this case and is in any event largely mooted by the Interlocutory Appeals Act of 1958, 28 U.S.C. 1292(b).

in the Federal Courts: Rule 53, 58 Columbia Law Review 452, 454. The order of reference entered here was therefore clearly validly issued. Indeed, the petitioners implicitly recognized the validity of the original order of reference when they abandoned their motion to terminate and set aside the order and limited their motion to a request for modification in the exercise of the District Court's discretion.

Stripped of its wrappings, therefore, the only question before the Court of Appeals was whether the District Court abused its discretion in refusing to modify the order of reference after all of the parties had accepted and operated under it for a period of over eight years and when there was no showing of any change in circumstances other than the identity of the chief attorney in charge of the case for the petitioners. Whether the order of reference should be modified at this late date does not present a question which calls for review by this Court.

Judge Pine, the District Judge, held, rightly, in the exercise of his discretion, that modification of the order of reference would "cause confusion and uncertainty in many aspects of this complicated case which are now impossible to visualize" and that "too much water has gone over the dam to justify such a modification now" (J.A. 150).

For example, practically all of the proceedings affecting the intervenors have been before the Master. Both the petitioners and the intervenors took the initiative in bringing a myriad of matters before the Master; no one questioned the propriety of his control over the case. As a result of these proceedings, the Master has swept away much of the underbrush and laid down ground rules, affect-

ing the claims in intervention. Indeed, practically every phase of the intervention proceedings was permeated with questions of substantive law. It was the Master who confirmed that the claims of intervenors could be maintained by way of a derivative action as well as individually (J.A. 116). After full argument concerning the legal nature of the intervention claims, he ruled on the impact of the Assignment of Claims Act, 31 U.S.C. 203, on transfers of stock in Chemie after the vesting (J.A. 122). He presided over a series of pre-trial hearings to outline the issues for trial of the intervenors' claims (J.A. 12-16 and 166-217). And he defined the proof necessary and the extent of recovery under the *Kaufman* decision, 343 U. S. 156. In addition, there came before the Master a constant stream of motions, interrogatories and hearings concerning the diverse problems of individual Chemie stockholders (see J.A. 9-15).

Because much of the evidence in this case will inevitably be in the form of interrogatory, deposition and discovery and not in the form of testimony at the trial, the impressions gained by, and the determinations of the Master on all phases of the case patently are as significant, if not more significant, than determinations to be made on trial. They relate, indeed, directly to the main issue in the case, the freedom from enemy status or t: .t of the company by reason of its management, its ownership and its relationship with enemies. Insofar as the position of stockholders is concerned, the greatest part of the hearing of their claims and adjudication of their rights may well have taken place before the formal trial. To start afresh may well be prejudicial to the interest of the non-enemy stockholders.

For these reasons, the normal distinction between pre-trial proceedings and trial, especially after ten years, is inapplicable to this unprecedented case.

The Master here with the consent of all parties over a period of eight years has acquired a unique familiarity with all phases of this exceptional litigation and has become the person best acquainted with its complexities. It is with good reason that the District Court in exercising its discretion noted as a major consideration against modification that the Master's extensive familiarity with the case "acquired over the years . . . would be forever lost" (J.A. 150) if the requested modification were granted.

No one will dispute that this case is unique and that its issues are no longer of general significance. This is the only remaining vested property case of great substance under the Trading with the Enemy Act. It involves the issue of the enemy or non-enemy character of a particular publicly owned Swiss corporation and, if the corporation perchance is not entitled to a total recovery, the rights of its non-enemy stockholders. Since the issuance of the order of reference, the issues have become even more complicated by reason of the intervention of non-enemy stockholders. The Government, when it espoused the reference and defended it against an attempt to vacate it, recognized that on every score the case warranted the flexible, consistent and knowledgeable guiding hand of a special master. The Government also manifestly knew that under F.R.C.P. 53 (e)(2), the "clearly erroneous" rule applied to findings of fact of the Master. Yet it was content then, and since, *i.e.*, from 1950 to 1958, to have the case fully tried by a Special Master.

As Professor Moore has put it: "In the absence of some such [timely] objection, proceeding before the master constitutes a waiver of any potential objection to the reference". 5 Moore's Federal Practice (2d ed.), 2947. Petitioners' conduct and proceedings before the Special Master may fairly be said to constitute more than a waiver, and be tantamount to estoppel.

Even assuming there were authority for modification of this order of reference at this late date, such modification would be a matter within the discretion of the District Court. The Court of Appeals has found that there was no abuse of discretion. No cogent reasons have been advanced to justify a contrary finding. This should end the matter.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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